United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5012

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

In the Matter of
THE BOHACK CORPORATION
Debtor.

P/S

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff-Appellee,

v.

THE BOHACK CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Preliminary Statement

The Appellee concedes that the preliminary statement made by the Appellant in its Brief is correct.

Issue Presented

The issue as stated in the Brief of the Appellant is stated properly. However, the Appellee does not agree with the position stated by the Appellant that this Court should reverse the position stated by the Court *In the Matter of Straus-Duparquet, Inc.* v. *Local Union No. 3 International Brotherhood of Electrical Workers,* 386 F.2d 649 (1967).

ARGUMENT

SEVERANCE PAY CREATED BY THE ACT OF A DEBTOR-IN-POSSESSION OPERATING IN A CHAPTER XI PROCEEDING IS AN ADMINISTRATION CLAIM UNDER SECTION 64a(1) OF THE BANKRUPTCY ACT.

It is respectfully submitted that this Court should follow the decision rendered by the Court of Appeals for the Second Circuit *In the Matter of Straus-Duparquet, supra.*

It is respectfully submitted that the Appellant does not appear to follow the thrust of the reasoning of the decision as stated by Judge Hays as expressed *In the Matter of Straus-Duparquet.* It is not necessary to repeat the verbiage as stated by Judge Hays, *In the Matter of Straus-Duparquet,* by reason of the fact that the Appellant sets forth verbatim the language of Judge Hays on pages 2 and 3 of the Appellant's Brief. It is very important to note the third paragraph quoted by the Appellant of the decision of Judge Hays which appears on page 3. Judge Hays outlines the fact that severance pay is compensation for termination of the employment and that the employment of the claimants was terminated as an incident of the administration of the bankrupt's estate. Therefore, if the Debtor-In-Possession had not terminated the employment of the claimants in question in the case at bar as well as *In the Matter of Straus-Duparquet,* the employees would not have been entitled to any claim for severance pay.

The matter of severance pay is a part of a written agreement between the Debtor-In-Possession and its employees and a claim for severance pay arises only when the employee is discharged by the act of the employer. In the event that the employee should die or would not be discharged during the pendency of the bankruptcy case, the employee could not make any claim for severance pay. The reasoning for this conclusion is due to the fact that the contract specifically provides that severance pay is earned

by the employee only at the moment when the employer severs the employment relationship of the employee. In the case at bar, it is conceded that the severance of the employees who are the claimants in this proceeding took place during the Chapter XI proceeding. Therefore, it is quite obvious that the cause of action for severance pay arose during the pendency of the Chapter XI proceeding and as Judge Hays indicated *In the Matter of Straus-Duparquet,* the full severance pay is due whenever termination of employment occurs.

The cases cited by the Appellant in its Brief are easily distinguishable from the case at bar and do not stand for the authority that it is contrary to the decision by this Court *In the Matter of Straus-Duparquet.*

The first case that is cited by the Appellant is *In Re Public Ledger,* 161 F.2d 762 (3d Cir., 1947). It should be noted at the outset that the Public Ledger case is one that arose as a result of a Chapter X proceeding. The debtor did not continue the operation of its business but a Receiver was appointed by the Court and this Receiver proceeded to liquidate the assets of the bankrupt. In fact, the primary part of the proceeding related to the question of the discharge of the employees and their question of vacation pay and how it was to be treated.

It should be noted that this Court considered the *Public Ledger* case when it decided the *Matter of Straus-Duparquet.* In fact Judge Hays refers to the *Public Ledger* case in his decision *In the Matter of Straus-Duparquet* and felt that the decision of the Court of Appeals for the Third Circuit in the *Public Ledger* case did not hold otherwise. It should also be pointed out that the *Public Ledger* case was decided in 1947 which was 20 years prior to the decision of this Court *In the Matter of Straus-Duparquet.*

The Appellant refers to the matter of *In Re Ad Service Engraving Company,* 338 F.2d 41 (6th Cir., 1964) as being closer to the reasoning of this Court. It should be pointed

out that the facts of this case are completely different from the case at bar. In the *Ad Service* case, that matter was initiated by the filing of an involuntary petition in bankruptcy on February 27, 1961 and the bankrupt was adjudicated as such on March 8, 1961. The matter did not involve a Chapter XI proceeding and the only question before the Court was primarily vacation pay and how it should be treated. In addition, the question before the Court in the *Ad Service Engraving Company* matter was that severance pay, if any, were damages sustained by the employee at the time of the filing of the involuntary petition in bankruptcy and it did not involve the termination of employment by a Debtor-In-Possession. Therefore, it is quite obvious that the *Ad Service Engraving Company* matter has no connection whatsoever with the case at bar.

The Appellant refers to the case of *McCloskey* v. *Division of Labor Law Enforcement,* 200 F.2d 402 (9th Cir., 1952). Again, it should be pointed out that the case cited is one where the bankrupt made a General Assignment for the Benefit of Creditors and subsequently an involuntary petition in bankruptcy was filed. Thereafter, the bankrupt was adjudicated as such. The *McCloskey* case was not a Chapter XI case nor a situation where there was a Debtor-In-Possession.

However, it is very interesting to note in the case of *McCloskey* v. *Division of Labor Law Enforcement* that Judge Healy wrote

> "the right to the severance wages arose only on the happening of the contingency specified in the contract."

It would, therefore, appear that Judge Healy would have been in complete agreement with the reasoning of this Court *In the Matter of Straus-Duparquet* because Judge Hays ruled that the severance pay arose only when the employer terminated the employment relationship of the claimants and this event took place during the Chapter XI

proceedings. Therefore, the rights of the claimants arose at that time pursuant to the terms and conditions of the contract.

The Appellant cites the case, *In Re Otto,* 146 F. Supp. 786 (DC Cal. 1956). It should be pointed out that this particular case has absolutely no relevancy to the case at bar. The *Otto* case refers to a claim being made for contributions to a welfare fund. It was properly held in that case that a claim for contributions to a welfare fund is not entitled to priority of any type and that it is simply a general unsecured claim. This matter has been resolved by the Supreme Court of the United States in the famous case of *United States* v. *Embassy Restaurant, Inc.,* 359 U.S. 29 (1959). Certainly, the *Otto* case has no relationship whatsoever with the facts involved in the case at bar.

The last case cited by the Appellant in its brief is *In Re Men's Clothing Code Authority,* 71 F. Supp. 469 (S.D.N.Y. 1937). This case cited by the Appellant also has no connection whatsoever with the case at bar. The *Men's Clothing* case relates to a straight bankruptcy case and does not involve a Chapter XI proceeding. It relates to a claim made for vacation pay as well as to damages sustained prior to the bankruptcy proceeding by reason of the filing of the petition in bankruptcy. There is no question but that any claim for severance pay that arose prior to the bankruptcy proceedings would be a damage claim. Therefore, the *Men's Clothing Code Authority* case has no relationship whatsoever with the case at bar.

It is respectfully submitted that a case that is more in holding with the *Matter of Straus-Duparquet* is a case decided by the Court of Appeals for the Second Circuit *In Re Wil-Low Cafeterias Inc.,* 111 F.2d 429 (1940). In this case, Judge Augustus N. Hand stated that one week's pay during the reorganization period of the bankruptcy was properly considered as an expense of administration.

It is respectfully submitted that the Appellant has not come forward with any plausible argument from a legal

standpoint why the holding *In the Matter of Straus-Duparquet* should not be followed by this Court.

The Appellant attempts to mislead this Court with matters that are not in issue. The Appellant indicates that the Appellant would be hampered in the implementation of a successful Plan of Arrangement and this is also the furthest from the truth. A review of the Appellant's Appendix will indicate on page A-33 that the Appellant and the Appellee entered into a stipulation which was approved by Bankruptcy Judge C. Albert Parente whereby the Appellee arranged for the claims of the employees to be paid over a period of five years or at the same time that payments would become payable to the general unsecured creditors. The claimants have cooperated in every respect to assist the Appellant in working out a Plan of Arrangement. In fact, to this date, the Appellant has still failed to work out any Plan of Arrangement which has received the acceptance of the Creditors Committee. Therefore, any argument by the Appellant to the effect that the debtor is being hampered in its negotiations is without any basis in fact. Furthermore, it should be pointed out to this Court that the representatives of the Creditors Committee participated in the proceedings before Bankruptcy Judge C. Albert Parente and are quite aware of the terms and conditions of the stipulation of settlement between the Appellant and the Appellee and have raised no objections whatsoever to this agreement.

It is, therefore, respectfully submitted that the law is quite clear to the effect that the rights of the Appellee to severance pay arose during the Chapter XI proceedings by reason of the act of the Appellant and that pursuant to the terms and conditions of the contract between the parties, the Appellee is entitled to be considered as an administration expense claim for the severance pay claims due to those employees who were severed by the act of the Appellant. Furthermore, it should also be noted that there

are still some employees of the Appellee who are in the employ of the Appellant and whose employment has not been severed. These employees are not entitled to any claim for severance pay and are not parties to this proceeding.

CONCLUSION

The order of the District Court affirming the Bankruptcy Judge in holding that severance pay claims are administration claims against the estate pursuant to Section 64a(1) of the Bankruptcy Act should be affirmed.

November 3, 1975.

Respectfully submitted,

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Service of three (3) copies of

the within Brief is hereby admitted this

7th day of November, 1975

W. Lee Stuntz

Attorney for